



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Chapter I

[Docket No. FWS–HQ–ES–2015–0165; FXES11140900000-178; FF09E33000]

Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Policy; withdrawal.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce we are withdrawing the Endangered Species Act (ESA) Compensatory Mitigation Policy, published December 27, 2016 (ESA-CMP). In our document of November 6, 2017 we requested additional public comments regarding the policy’s overall mitigation planning goal of net conservation gain. We are now withdrawing this policy. The Service does not have authority to require “net conservation gain” under the ESA, and the policy is inconsistent with current Executive branch policy. Except as otherwise specified, all policies or guidance documents that were superseded by ESA-CMP are reinstated.

DATES: Withdrawal effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments and materials received, as well as supporting documentation, are available on the Internet at <http://www.regulations.gov> at Docket Number FWS–HQ–ES–2015–0165.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703–358–2442.

SUPPLEMENTARY INFORMATION: The ESA-CMP (81 FR 95316, December 27, 2016) was developed to ensure consistency with existing directives in effect at the time of issuance, including former President Obama's Memorandum on Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment (November 3, 2015). Under the memorandum, all Federal mitigation policies were directed to clearly set a net-benefit goal or, at minimum, a no-net-loss goal for natural resources, wherever doing so is allowed by existing statutory authority and is consistent with agency mission and established natural resource objectives. The Presidential Memorandum was subsequently rescinded by Executive Order 13783, "Promoting Energy Independence and Economic Growth" (March 28, 2017).

The ESA-CMP also described its consistency with the Secretary of the Interior's Order 3330 on Improving Mitigation Policies and Practices of the Department of the Interior (October 31, 2013), which established a Department-wide mitigation strategy to ensure consistency and efficiency in the review and permitting of infrastructure-development projects and in conserving natural and cultural resources. The Secretary's Order was subsequently revoked by Secretary of the Interior's Order 3349 on American Energy Independence (March 29, 2017). It directed Department of the Interior bureaus to reexamine mitigation policies and practices to better balance conservation strategies and policies with job creation for American families.

In light of the revocation of the 2015 Presidential Memorandum and Secretary's Order 3330, on November 6, 2017, the Service requested comment on the ESA-CMP, along with the Service-Wide Mitigation Policy (81 FR 83440, November 21, 2016), specifically "regarding whether to retain or remove net conservation gain as a mitigation planning goal within our mitigation policies." Mitigation Policies of the U.S. Fish and Wildlife Service; Request for Comment (82 FR 51382, 51383, November 6, 2017). The comment period for this request ended on January 5, 2018.

Under Supreme Court precedent, the Takings Clause of the Fifth Amendment of the United States Constitution limits the ability of government to require monetary exactions as a condition of permitting private activities, particularly private activities on private property. In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), the Supreme Court held that a proposal to fund offsite mitigation proposed by the State of Florida as a condition of granting a land-use permit must satisfy the test established in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan*

v. *City of Tigard*, 512 U.S. 374 (1994). Specifically, “a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.” *Id.* at 599.

Compensatory mitigation raises serious questions of whether there is a sufficient nexus between the potential harm and the proposed remedy to satisfy constitutional muster.

Further, because by definition compensatory mitigation does not directly avoid or minimize the anticipated harm, its application is particularly ripe for abuse. At times the nexus between a proposed undertaking and compensatory mitigation requirements is far from clear. These concerns are particularly acute when coupled with a net conservation gain goal, which necessarily seeks to go beyond mitigating actual or anticipated harm to forcing participants to pay to address harms they, by definition, did not cause.

In light of the change in national policy reflected in Executive Order 13783 and Secretary’s Order 3349, the comments received by the Service, and concerns regarding the legal and policy implications of a net conservation gain goal, the Service has concluded that it is no longer appropriate to retain a net conservation gain standard in the Service’s overall mitigation planning goal within the ESA-CMP. Because the net conservation gain standard is so prevalent throughout the ESA-CMP, the Service is implementing this conclusion by withdrawing it.

Summary of Comments and Responses

Executive Order 13783 – "Promoting Energy Independence and Economic Growth" (March 28, 2017) – rescinded the Presidential Memorandum on Mitigating

Impacts on Natural Resources from Development and Encouraging Related Private Investment. The Secretary of the Interior subsequently issued Secretarial Order 3349 on American Energy Independence (March 29, 2017), which directed Department of the Interior (DOI) bureaus to reexamine mitigation policies and practices to better balance conservation strategies and policies with job creation for American families. Pursuant to Secretarial Order 3349, we published a notice on November 6, 2017 (82 FR 51382) requesting additional public comments specifically addressing the advisability of retaining or removing references to net conservation gain as a mitigation planning goal within our mitigation policies. In addition, in carrying out Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” DOI published a document with the title “Regulatory Reform” in the *Federal Register* of June 22, 2017 (82 FR 28429). The document requested public comment on how DOI can improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification. This notice addresses comments that DOI has received in response to the regulatory reform docket that relates to the Service’s use of mitigation.

During the combined comment periods, for the ESA-CMP we received approximately 335 public comment letters, including comments from Federal, State, and local government entities; industry; trade associations; conservation organizations; nongovernmental organizations; private citizens; and others. The range of comments varied from those that provided general statements of support or opposition to the draft and final 2016 ESA-CMP, to those that provided extensive comments and information supporting or opposing the draft and final 2016 ESA-CMP.

We considered all of the comments we received in the comment period beginning November 6, 2017 (82 FR 51382), and following the DOI's "Regulatory Reform" *Federal Register* announcement (June 22, 2017, 82 FR 28429); we respond to the substantive comments below.

A. Authority to Include Net Conservation Gain or No Net Loss under the ESA

Comment (1): One commenter stated there were constitutional limits on requiring mitigation, referencing the *Koontz v. St. Johns River Water Management District* case decided by the U.S. Supreme Court, 570 U.S. 595 (2013). This commenter noted that any compensatory mitigation measures must have an essential nexus with the proposed impacts and be roughly proportional, or have a reasonable relationship between the permit conditions required and the impacts of the proposed development being addressed by those permit conditions.

Response: The Service agrees that the *Koontz* case, as well as predecessor cases including, but not limited to, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), raise serious constitutional concerns about the viability of some elements of compensatory-mitigation programs. These concerns are particularly acute for offsite compensatory-mitigation programs and programs that seek a net conservation gain. Offsite compensatory-mitigation programs raise concerns regarding an appropriate nexus between the anticipated impact and the mitigation requirement. As mitigation moves further away from the direct impacts of a project, the risk that the connection between required compensation and the initial project becomes more attenuated increases. Further, by seeking to err on the side of mitigating

above and beyond the impacts of the specific project at issue, the net conservation gain standard raises inherent concerns about proportionality, as well as the appropriate nexus between project impacts and mitigation methods, particularly where mitigation is in essence being used to rectify past, unrelated harms. We, like all agencies, must implement our authorities consistent with any applicable case law as appropriate. Consideration of the Constitutional standard set forth in *Koontz* is one reason, though not the only reason, that the Service is withdrawing its previous Mitigation Policy and ESA-CMP. In light of the *Koontz* case and any other relevant court decisions, the Service, in using its previous guidance (e.g., 2003 guidance on the establishment, use, and operation of conservation banks (68 FR 24753, May 8, 2003) and 2008 recovery crediting guidance (73 FR 44761, July 31, 2008)), will make sure that any statutorily authorized mitigation measures will have a clear connection (i.e., have an essential nexus) and be commensurate (i.e., have rough proportionality) to the impact of the project or action under consideration.

Comment (2): Many commenters addressed the mitigation planning goal of improving (i.e., a net gain) or, at minimum, maintaining (i.e., no net loss) the current status of affected resources. A number of commenters supported the goal while a number of commenters opposed the inclusion of a net conservation gain. Of commenters opposed to net conservation gain, their specific reasons included:

- a) the Service lacks the statutory authority to implement the net conservation gain goal for mitigation planning;
- b) the net conservation gain goal imposes a new standard for mitigation and that mitigation requirements should be commensurate with the level of impacts;

- c) concern about the costs associated with achieving net conservation gain;
- d) questions about the ability to achieve net conservation gain and how it would be measured;
- e) the ESA-CMP does not provide the methodology to assess or measure the net conservation gain; and
- f) net conservation gain is incompatible with the standards of ESA sections 7 and 10.

Also, several commenters asserted that a mitigation planning goal of no net loss is inconsistent with the ESA and exceeds our authorities under the ESA.

Response: The ESA requires neither “net conservation benefit” nor “no net loss,” and the Service has not previously required a “net benefit” nor “no net loss” while implementing the ESA. Under the ESA, the standard for section 7 is that a “Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat.” (§ 7(a)(2)); under section 10 the requirement is “to the maximum extent practicable, minimize and mitigate the impacts of such taking” (§ 10(a)(2)(B)(ii)). As one court has noted, “[t]he words ‘maximum extent practicable’ signify that the applicant may do something less than fully minimize and mitigate the impacts of the take where to do more would not be practicable. Moreover, the statutory language does not suggest that an applicant must ever do more than mitigate the effect of its take of species.” *National Wildlife Federation v. Norton*, 306 F. Supp. 2d 920, 928 (E.D. Cal. 2004); *see also Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016) (holding that the

obligation to minimize and mitigate to the maximum extent practicable was satisfied by a plan that the Service found to fully offset the impact of the proposed taking). Since what is “practicable” may not fully offset proposed take, the “maximum extent practicable” standard is inconsistent with both a general net conservation gain and no-net-loss mitigation objective. Nothing in the ESA requires that the Service apply a net conservation gain or no net loss standard.

Those commenters supporting the goal generally asserted, among other points, that the Service has the authority to require compensatory mitigation, found the measures to be clear, and thought the policy encouraged consistent implementation. While we appreciate these comments, for the reasons described above, we are not persuaded.

As noted above, because the concepts of “net conservation gain” and “no net loss” were central to and embedded throughout the policies, modifying the policies would likely have caused significant confusion. This fact, together with the more recently issued Executive and Secretarial Orders that questioned “net gain,” lead to our decision here to withdraw the ESA-CMP.

B. Landscape-scale Approach

Comment (3): Several commenters described their concerns with the implications of the ESA-CMP’s landscape-scale approach including:

- a) There is no statutory authority for taking a landscape-scale approach;
- b) Including a landscape-scale approach would lead to the Service seeking mitigation for impacts beyond a project under review, including impacts that happened in the past or in unrelated locations;

- c) A general concern that a landscape-scale approach would mean Federal overreach, including disregard for the plans, processes, and resource interests of States, Tribes, and local governments.

Response: We agree with commenters that proponents' and action agencies' responsibilities include the provisions of relevant authorities and that those responsibilities do not extend to impacts unrelated to their action. Requiring mitigation to impacts unrelated to a proponent's action would likely conflict with the "essential nexus" required under *Koontz* for property development (see Comment 1 above). Accordingly, any effort to apply a landscape-scale approach to mitigation must ensure that there is an essential nexus between the proposed activity and the contemplated mitigation and that mitigation is not being imposed to correct for past impacts by other actors.

C. Authority to Include Candidate or At-risk Species

Comment (4): Several commenters stated that the Service has no statutory authority under the ESA to include candidate or at-risk species in compensatory-mitigation mechanisms.

Response: The commenter is correct that the Service cannot require the inclusion of compensatory mitigation for impacts to at-risk and candidate species. Including candidate or other at-risk species in mitigation would be voluntary on the part of the Federal agency or applicant, which may, if the species is listed, streamline future reinitiation of consultation or amendments to habitat conservation plans (HCPs). Under section 10 of the ESA, although the applicant voluntarily develops its HCPs in

consultation with the Service, the applicant ultimately decides which candidate or non-listed at-risk species it desires to include in its HCP. Many applicants voluntarily include at-risk species in their HCPs to receive “no surprises” assurances and preclude the need to amend the associated incidental take permit, should the species become listed in the future. This is consistent with ESA goals of recovering listed species and, ideally, avoiding the need to list species because threats to them have been addressed. Furthermore, applicants may include candidate or other at-risk species to address State or other local requirements (e.g., California’s Natural Community Conservation Planning Act). But in all cases, considerations of non-ESA-listed species are voluntary on the part of the Federal agency or applicant.

National Environmental Policy Act (NEPA)

We have analyzed the withdrawal of this policy in accordance with the criteria of the National Environmental Policy Act, as amended (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality’s Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and the Department of the Interior’s NEPA procedures (516 DM 2 and 8; 43 CFR part 46). Issuance of policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature, or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case may be categorically excluded under NEPA (43 CFR 46.210(i)). We have determined that a categorical exclusion applies to withdrawing this policy.

Paperwork Reduction Act of 1995

This policy withdrawal does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). OMB has reviewed and approved the information collection requirements for applications for incidental take permits, annual reports, and notifications of incidental take for native endangered and threatened species for safe harbor agreements, candidate conservation agreements with assurances, and habitat conservation plans under OMB Control Number 1018-0094, which expires on March 31, 2019. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments," and the Department of the Interior Manual at 512 DM 2, we have considered possible effects on federally recognized Indian tribes and have determined that there are no potential adverse effects of withdrawing this policy. Our intent with withdrawing these policies is to reduce confusion of mitigation programs, projects, and measures, including those taken on Tribal lands. We will work with Tribes as applicants proposing mitigation as part of proposed actions and with Tribes as mitigation sponsors.

Authority

The multiple authorities for this action include the: Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*); Fish and Wildlife Coordination Act, as amended, (16 U.S.C. 661–667(e)); and National Environmental Policy Act (42 U.S.C. 4371 *et seq.*).

Dated: July 24, 2018

Gregory J. Sheehan

Principal Deputy Director, U.S. Fish and Wildlife Service.

Billing Code 4333–15

[FR Doc. 2018-16171 Filed: 7/27/2018 8:45 am; Publication Date: 7/30/2018]